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July 13, 2022

BY E-MAIL & ECF

The Honorable John P. Cronan
United States District Judge
United States District Court
Southern District of New York
500 Pearl Street, Room 1320
New York, NY 10007

Re: Better Holdco, Inc. v. Beeline Loans, Inc., No. 1:20-cv-08686 (JPC) (SN)

Dear Judge Cronan:

This firm represents plaintiff Better Holdco, Inc. (“Better” or “Plaintiff”) in the above-referenced action. Pursuant to Rule 4.B.ii of the Court’s Individual Rules and Practices in Civil Cases (“Rules”), Better respectfully requests leave to file certain documents under seal or with redactions in connection with its oppositions to the motions of Beeline Loans, Inc. (“Beeline”) to exclude Plaintiff’s expert Stephen Holzen (“Motion to Exclude”) and for summary judgment (“Motion for Summary Judgment”), which are being filed concurrently with this letter-motion.

Better seeks leave to file under seal or in redacted form certain documents that it has designated as Confidential Discovery Material under the Amended Protective Order. (See Dkt. No. 101.) While these are “judicial documents” to which a presumption of public access applies, *see Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006), that presumption is to be balanced against countervailing factors, such as whether the materials at issue contain commercially sensitive and proprietary information. *See Playtex Prods., LLC v. Munchkin, Inc.*, No. 14-cv-1308 (RJS), 2016 WL 1276450, at *11 (S.D.N.Y. Mar. 29, 2016) (granting motion to seal information reflecting sales, revenues, and marketing strategies because disclosure could cause competitive harm). The presumption can be overcome when the disclosure of information about confidential business strategy, financial, marketing and promotional expenses, and other sensitive information could place a party at a competitive disadvantage. *See, e.g., New York v. Actavis*, No. 14-cv-7473, 2014 WL 5353774, at *3-4 (S.D.N.Y. Oct. 21, 2014) (granting motion to seal business plans, profit projections, and budgets).

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Confidential Information Previously Filed in Redacted Form or Under Seal*Exhibits 21 and 23 to the Second Wityk Declaration*

Better seeks to file redacted versions of Exhibits 21 and 23 to the Second Declaration of Priyanka Wityk in Opposition to Defendant's Motion to Exclude the Testimony of Plaintiff's Expert Stephen Holzen ("Second Wityk Declaration"). Exhibit 21 to the Second Wityk Declaration is the expert report of Stephen Holzen, and is also Exhibit 124 to the Declaration of Jacob L. Hirsch in Opposition to Defendant's Motion for Summary Judgment ("Hirsch Declaration"). Exhibit 23 to the Second Wityk Declaration is the expert report of Karl D. Weisheit. The Court previously granted Better's request to redact the same portions of these documents in connection with its motion to exclude Beeline's experts. (*See* Dkt. No. 217.)

Exhibits 21 and 23 disclose the following confidential business information whose disclosure could place Better at a competitive disadvantage:

First, the exhibits disclose information from Better's Operating Model, which consists of dozens of spreadsheets reflecting Better's highly confidential financial information, and other sensitive operating cost and salary information, *see* Second Wityk Decl. Ex. 21, Holzen Rep. ¶¶ 87, 132 & Exs. 2.3, 3.1-3.3, 3.5-3.6, 3.8, 4.3-4.5, 6.1, and text accompanying footnotes 340-43 & 345-47; and Ex. 23, Weisheit Rep. at 50 and Schedules 3, 3.1, 5, 7. These materials should be sealed. *See Actavis*, 2014 WL 5353774, at *4.

Second, the exhibits disclose information concerning Better's confidential agreements with five of its marketing partners, such as non-public pricing information and other terms, *see* Second Wityk Decl. Ex. 21, Holzen Rep. ¶ 32; Ex. 23, Weisheit Rep. at 29-30. This information should be redacted. *See Actavis*, 2014 WL 5353774, at *4 (granting motion to seal information related to promotional budgeting).

Third, the exhibits disclose confidential information about Better's marketing strategies and costs, *see* Second Wityk Decl. Ex. 21, Holzen Rep. ¶¶ 90, 92-97 & Exs. 5.0, 8.1 and 8.2; Ex. 23, Weisheit Rep. at 24-25, 45-46. The competitive sensitivity of these materials outweighs the presumption of public access, and they should be sealed. *See Playtex*, 2016 WL 1276450, at *11 (granting motion to seal documents reflecting marketing strategies).

Fourth, Better also seeks leave to redact paragraphs 91 and 135 and exhibits 8.0 and 9.0 of the Holzen Report because they contain or refer to information from documents that Beeline has designated as Confidential Discovery Material under the Amended Protective Order. (Those documents were produced with Bates numbers BEE_00004946-4958, BEE_00005141, BEE_00018665-18686, BEE_00020965, and BEE_00041488. They are not being filed with the Court.)

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Exhibit 3 to the Hirsch Declaration

Better also seeks leave to file Exhibit 3 to the Hirsch Declaration in redacted form to protect from disclosure portions of the document that disclose the terms of a confidential settlement agreement between Better and non-party Jack Abramowitz. (*See* Hirsch Decl. Ex. 3 at 194:7-200:19.) The Court previously granted Better's request to file the settlement agreement under seal. (*See* Dkt. No. 221.)

Exhibit 104 to the Hirsch Declaration

Better also seeks leave to file under seal Exhibit 104 to the Hirsch Declaration, which bears Bates number BEE_00005206. This document was designated as Confidential Discovery Material by Beeline, and the Court previously granted Better's request to file it under seal. (*See* Dkt. No. 217.)

Additional Information to Be Filed Under Seal or in Redacted Form

Better also seeks leave to file under seal or in redacted form certain additional documents that contain Better's confidential business information whose disclosure could place Better at a competitive disadvantage.

First, Exhibits 39, 63-64, 66, 93, 98-102, and 105 to the Hirsch Declaration and Exhibit 22 to the Second Wityk Declaration contain or refer to Better's competitively sensitive financial and other business information relating to its profits, revenue, originations and closings figures, performance metrics and confidential salary information. *See* Hirsch Decl. Ex. 39 at 7, Exs. 63-64, Ex. 66 at exhibits J-M, Ex. 93, Exs. 98-102, Ex. 105; Second Wityk Decl. Ex. 22 at 129:3-14. Accordingly, these documents should be sealed or redacted. *See Actavis*, 2014 WL 5353774, at *4.

Second, Exhibit 61 to the Hirsch Declaration contains Better's confidential and proprietary business practices with respect to its handling of loan files. *See* Hirsch Decl. Ex. 61. Similarly, Exhibit 67 to the Hirsch Declaration contains confidential information about Better's lead pricing strategies. *See* Hirsch Decl. Ex. 67. Exhibit 86 includes information about Better's confidential practices with respect to calculations concerning customers' interest rates. *See* Hirsch Decl. Ex. 86. This, too, is non-public, confidential information that should be filed under seal. *See Actavis*, 2014 WL 5353774, at *4.

Third, Exhibits 3, 42, 45-47, 66, 78, 81, 83, and 95 to the Hirsch Declaration contain or refer to confidential information about Better's marketing strategies, costs, analytics, and competition analyses. *See* Hirsch Decl. Ex. 3 at 50:25-58:23, Ex. 42, Exs. 45-47, Ex. 66 at exhibits N-U, Ex. 78, Ex. 81, Ex. 83, and Ex. 95 at 67:24-68:9. The competitive sensitivity of these materials outweighs the presumption of public access, and

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they should be sealed. *See Playtex*, 2016 WL 1276450, at *11 (granting motion to seal documents reflecting marketing strategies).¹

Fourth, Exhibit 22 to the Second Wityk Declaration also should be redacted to prevent the disclosure of the home address of Better's expert, Mr. Holzen. *See* Second Wityk Decl. Ex. 22 at 7:18-21.

Documents Designated Confidential by Beeline

Better further seeks leave to file the following exhibits to the Hirsch Declaration under seal or in redacted form because Beeline has designated those exhibits as Confidential Discovery Material under the Amended Protective Order:

- Ex. 35 (BEE_00024155-245156)
- Ex. 36 (BEE_00023910-23932)
- Ex. 37 (BEE_00018709-18731)
- Ex. 38 (BEE_00030812-30847)
- Ex. 51 (BEE_00002174-2179)
- Ex. 57 (BEE_OC_00000559-561)
- Ex. 59 (BEE_00000575-579)
- Ex. 76 (BEE_00004053)
- Ex. 88 (BEE_00001020-1030)
- Ex. 89 (BEE_00000942-951)
- Ex. 108 (BEE_OC_00004959-4965)

Better also seeks leave to file Exhibit 22 to the Second Wityk Declaration in redacted form because Beeline has designated materials referenced by this exhibit as Confidential Discovery Material under the Amended Protective Order. *See* Second Wityk Decl. Ex. 22 at 199:22-200:16.

On July 8, 2022, I spoke with counsel for Beeline concerning Beeline's confidentiality designations of certain materials that Better intended to file in connection with its opposition to Beeline's Motion for Summary Judgment. Beeline withdrew its confidentiality designations for some documents but not the documents listed above.

* * *

For the foregoing reasons, Better respectfully requests permission to redact the following portions of exhibits to the Second Wityk Declaration in opposition to the Motion to Exclude:

- **Ex. 21²** (Holzen Rep. ¶¶ 87, 90-97, 132, 135 & Exs. 2.3, 3.1-3.3, 3.5-3.6, 3.8, and 4.3-4.5, 5.0, 6.1, 8.0, 8.1, 8.2 and 9.0)

¹ Beeline has likewise designated the following exhibits to the Hirsch Declaration as Confidential Discovery Material: Exs. 39, 61, 67, 93, 98, 100-102, and 105.

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- **Ex. 22** (Holzen Tr. 7:18-21, 129:3-14, 199:22-200:16)
- **Ex. 23** (Weisheit Rep. at 24-25, 29-30, 45-46, 50 & Schedules 3, 3.1, 5, and 7)

Furthermore, for the foregoing reasons, Better respectfully requests permission to file the following exhibits to the Hirsch Declaration in redacted form:

- **Ex. 3** (Abramowitz Tr. 50:25-58:23, 194:7-200:19)
- **Ex. 38** (BEE_00030812-30847)
- **Ex. 42** (BEE_00000538-540)
- **Ex. 45** (BEE_00000547-549)
- **Ex. 46** (BEE_00000550-552)
- **Ex. 47** (BEE_00000541-544)
- **Ex. 51** (BEE_00002174-2179)
- **Ex. 64** (BEE_00003914)
- **Ex. 66** (Schnell Rep. Exhibits J-U)³
- **Ex. 81** (BEE_00000665-667)
- **Ex. 86** (BEE_00002106-2110)
- **Ex. 95** (Doolittle Tr. 67:24-68:9)

Better also respectfully requests permission to file the following exhibits to the Hirsch Declaration under seal:

- **Ex. 35** (BEE_00024155-24156)
- **Ex. 36** (BEE_00023910-23932)
- **Ex. 37** (BEE_00018709-18731)
- **Ex. 39** (BEE_00017486-17493)
- **Ex. 57** (BEE_OC_00000559-561)
- **Ex. 59** (BEE_00000575-579)
- **Ex. 61** (BEE_00001143)
- **Ex. 63** (BETTER_00000176-177)
- **Ex. 67** (BEE_OC_00000590-594)
- **Ex. 76** (BEE_00004053)
- **Ex. 78** (BEE_00001181)
- **Ex. 83** (BEE_00001951)
- **Ex. 88** (BEE_00001020-1030)
- **Ex. 89** (BEE_00000942-951)
- **Ex. 93** (BEE_OC_00000299-302)
- **Ex. 98** (BEE_OC_00000167-171)

² Wityk Declaration Exhibit 21 is also Exhibit 124 to the Hirsch Declaration.

³ Exhibits J-U of the Schnell Report include Better's Operating Model and the Partner Agreements—the very documents at the heart of this dispute that Better asserts constitute the confidential information and trade secrets that Beeline misappropriated.

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- **Ex. 99** (BEE_00000597-598)
- **Ex. 100** (BEE_00001316-1322, BEE_00005352, BEE_000020950-20951)
- **Ex. 101** (BEE_OC_00000647-649)
- **Ex. 102** (BEE_OC_00000657-659)
- **Ex. 104** (BEE_00005206)
- **Ex. 105** (BEE_OC_00000159-162)
- **Ex. 108** (BEE_OC_00004959-4965)

Finally, Better also respectfully requests leave to file a redacted version of its Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment and its Response and Statement of Additional Material Facts Pursuant to Local Rule 56.1(b) in Opposition to Defendant's Motion for Summary Judgment to the extent that they contain or refer to confidential information in these exhibits.

We are available at the Court's convenience to discuss this application.

Respectfully submitted,

s/ Priyanka Wityk
Priyanka K. Wityk

cc: All Counsel of Record (by ECF)

The Court grants Plaintiff's request to file Exhibits 21, 22, and 23 to the Second Wityk Declaration in opposition to the Motion to Exclude with redactions. The Court also grants Plaintiff's request to file Exhibits 3, 35-39, 42, 45-47, 61, 63-64, 66-67, 78, 81, 83, 86, 88-89, 93, 95, 98-102, 104-105, and 108 to the Hirsch Declaration under seal or with redactions.

In light of Defendant's letter dated July 18, 2022, Dkt. 253, the Court denies Plaintiff's request as to Exhibits 51, 57, 59 and 76 to the Hirsch Declaration. Plaintiff is directed to file these Exhibits with redactions as proposed by Defendants on July 18, 2022. *See* Dkts. 253, 254.

The Court further grants Plaintiffs' request to file a redacted version of its Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment and its Response and Statement of Additional Material Facts Pursuant to Local Rule 56.1(b) in Opposition to Defendant's Motion for Summary Judgment to the extent they contain or refer to the confidential information in the exhibits referenced above.

SO ORDERED.

Date: July 19, 2022
New York, New York


JOHN P. CRONAN
United States District Judge